UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. 05 CV 5231 (RJS)

AMERINDO INVESTMENT ADVISORS, et al.,

Defendants.

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New York, N.Y.
October 25, 2013
3:30 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

U.S. SECURITIES AND EXCHANGE COMMISSION
Attorneys for Plaintiff
NEAL JACOBSON
MARK SALZBERG

ROBINSON BROG
Attorney for Defendant Vilar
DAVID BURGER

LAW OFFICE OF VIVIAN SHEVITZ
Attorney for Defendant Tanaka
VIVIAN SHEVITZ

FISHER BYRIALSEN & KREIZER
Attorney for Defendant Vilar
JANE FISHER-BYRIALSEN

ALSO PRESENT: IAN GAZES, Receiver

(In open court)

MR. JACOBSON: Good afternoon. Neal Jacobson. With me is Mark Salzberg from the SEC.

THE COURT: Good afternoon.

I'll do the defendants and then come back to the receiver defendants.

MS. SHEVITZ: Vivian Shevitz for Mr. Tanaka.

MR. BURGER: David Burger from Robinson Brog.

THE COURT: Mr. Burger, good afternoon.

For Mr. Vilar.

MS. FISHER-BYRIALSEN: Jane Fisher-Byrialsen. I'm here to observe because I think it's helpful for whatever comes in the future for our other case.

THE COURT: That's fine. You can stay where you are.

And we have the receiver here, as well.

MR. GAZES: Ian Gazes, the receiver.

THE COURT: Good afternoon to you.

We're here in connection with a number of different requests before the Court. I guess I'll take them up in no particular order, but I have except motion for reconsideration of my prior summary judgment ruling by the SEC and also by the defendants.

I issued an order this week asking the defendants to respond to the motion for reconsideration filed by the SEC and set a date for that. You saw that, Ms. Shevitz?

MS. SHEVITZ: No. I was driving here this morning and something bounced this morning, but I don't -- obviously, I can't see it when it's bouncing on my phone.

THE DEPUTY CLERK: November 4.

THE COURT: November 4 is the date that I set for responding to the motion for reconsideration. It's a fairly discrete issue. The circuit has ruled. In that ruling they said that they agreed with the SEC's position concerning the Mayer transactions which I found there was insufficient evidence from which to grant summary judgment on the Morrison issue. The circuit said no, not at all, we think that there's enough there. And they found my reasoning unpersuasive. So, that was the basis for the SEC's motion for reconsideration. It seems like the circuit agrees with them. So, it sounds like the summary judgment order that I issued would be enhanced because now a third victim would be deemed to have been victimized in the United States, so Morrison wouldn't apply. So, I think that's a very discrete issue. You're obviously, on top of it.

MS. SHEVITZ: I can't say I'm on top of it. I have not seen the rule. I not seen this today.

THE COURT: You've seen the SEC'S motion for reconsideration. They filed it a long time ago. The time to respond to it should have been a while ago, but I just issued an order directing you to respond. That's an issue that I

think is resolved.

I also have from Ms. Shevitz' motion or request for a stay of the summary judgment ruling and also renewed requests for CJA funds in this case. I issued a ruling today in the Mayer case on the CJA funds denying that request, and for the same reasoning that's set forth in that decision, I'm denying it here in the SEC case. I'm also denying the motion for a stay.

We're going forward on the SEC case now. There's no reason to wait. And there's a lot of people who, frankly, I think are waiting for us to get this going.

My principal concern then is what do we need do for discovery. I think I granted summary judgment on liability, but not for damages.

What sort of damages discovery is going to be necessary? Mr. Jacobson, I want to hear from you on that.

MR. JACOBSON: The only issue is in fact the amount of disgorgement amount.

MS. SHEVITZ: I can't hear you.

MR. JACOBSON: The only issues with respect to damages is with respect to your Honor's ruling on liability, based on collateral estoppel for the specific investors who are involved in the criminal case is the amount of disgorgement and penalty for them. In our papers, we did rely on the record in the criminal case with respect --

MS. SHEVITZ: I can't hear you, Mr. Jacobson.

MR. JACOBSON: In our papers on summary judgment, we did, in fact, make a calculation based on the record that was presented in the criminal case. I understand Ms. Shevitz is disputing the calculation of forfeiture and whatnot with respect to that case, however, in that case, there was a determination of a base forfeiture amount.

MS. SHEVITZ: I can't hear you.

MR. JACOBSON: There was a determination of a base forfeiture amount which was the amount of money received by the defendants, from specifically Lily Cates, the Mayers, Graciela Chavez, Tara Coburn, and one other investor, Robert Cox.

So based on our papers, we believe that all we need to show is a reasonable approximation of appropriate disgorgement. In this case, as the defendants have acknowledged, all of the money they receive has been commingled, all the investments, from their hedge fund, ATGF, ATGF II, the Panamanian hedge funds, that money has been commingled with the money that they raised from the GFRA, as well. My understanding is most of it is in one account.

MS. SHEVITZ: I can't hear. And I really would like to be able to hear what you're saying.

THE COURT: Speak into the microphone. I'm hearing him okay. If you want to move closer, that's fine, too.

MR. JACOBSON: From based on the papers that we

presented, we believe that we have already shown the appropriate amount of disgorgement with respect to those investors, as well as the appropriate calculation for a penalty.

As far as the discovery, to the extent we need to establish new numbers, I believe that the process that Mr. Gazes is involved in is probably the most accurate process that could be used at this point in order to determine the amount of disgorgement because of the commingling of the funds and whatnot.

It's impossible for us to know independently how much money was raised from each one of the investors and then the appropriate calculation of the penalty in our view would be a multiple of that number, as well.

I'm not aware of any discovery that we can take at this point that would shed light on the amount of disgorgement, other than what's already been presented in the criminal case and the process that Mr. Gazes is going through right now.

THE COURT: The short answer is you're not seeking any discovery on that issue.

MR. JACOBSON: No. However, we would like to rely on the report or the numbers and the amounts of claims that are coming in through the receivership process. Discovery, it's only the amount of loss. It's only the amount of money that was received by defendants. So, we have records that show

amounts that were raised. We could file another motion in the context of the summary judgment to show money raised from the defendants and present that and they can try to dispute it but really the only issue here is the amount of money raised at this point.

THE COURT: So, you're saying you don't need any discovery because you're going to be relying on what was in the criminal record. That's what you're saying?

MR. JACOBSON: In our summary judgment papers, we did rely on what was in the criminal -- we did rely on that. We also have our own records and we could supplement it with affidavits and whatnot from our own examiners who have gone through the various records and bank accounts to show money coming in from various investors, but there's no other discovery that we are aware of that would help in determining that number.

THE COURT: Remember, I didn't grant you summary judgment with respect to damages or disgorgement, right?

MR. JACOBSON: Correct. My understanding, your Honor did not grant it. You did request that the receiver do some due diligence and try to figure out the claims against the amounts that are in the bank accounts.

My understanding was there was some connection, perhaps. Your Honor did not intend that there be any connection between receivers' investigation and the amount that

the defendants might owe; however, if we can supplement what's in the criminal record with our own records and bank records and work that was done by examiners to determine what came from investors to the defendants' bank accounts and we could submit that in another pleading, a supplemental pleading to establish disgorgement specifically.

THE COURT: Mr. Gazes, is your report getting into what the gains or the profits of the defendants?

MR. GAZES: No, my report does not get into that. My report only simply reflects what the proof of claims have been and what the claimants are claiming. It would be, I think, an impossible task for us at this point to determine what profits there would be since the money was commingled. And in fact, the bulk of the money is in an account that is unrelated to the investment vehicles that were originally invested to begin with.

THE COURT: That's what I thought. I just wanted to make sure I wasn't missing something.

MR. JACOBSON: Again, in the criminal case, the amounts of forfeiture with respect to the specific investors that are named in our summary judgment papers were determined by the Court and those amounts were set forth by the Department of Justice in their pleadings that indicated that that money was money that was received from those specific investors, not necessarily losses, but money that was received from them and

paid to the defendants.

The cases that we cite stand for the proposition that our burden is to establish a reasonable approximation of disgorgement; however, when the defendants have created a situation such as these defendants have where all of the records are mixed up and the money is commingled, it's impossible for us to differentiate and figure out exactly how much went to them individually or to their entities. It's their burden then to come back and explain and prove that, in fact, this money should not be disgorgement.

So to the extent that those numbers are still valid from the criminal case, we would rest on those numbers.

THE COURT: Let me hear from defense counsel with respect to this.

MS. SHEVITZ: First of all, he continues to talk about commingled money as if there's something wrong with that. There's nothing wrong with that in foreign countries. The Capital Management case under the Second Circuit dealt with commingled monies, and I believe it was a Revco subsidiary. They were commingled funds in offshore accounts. It's not dirty.

THE COURT: I don't think that's the point Mr. Jacobson was making.

His point was that for purposes of discovering the gain or the disgorgement amount, there's not much point is what

he's saying because the commingling will make that process virtually possible.

Is that what you're saying?

MR. JACOBSON: Yes.

MS. SHEVITZ: I don't know if that makes it impossible because you have two individual defendants to see if they gained. Nobody has done that analysis ever, nobody has done that analysis. The forfeiture and loss amounts are going to be vacated. Those don't apply.

The forfeiture also implicates the restraining order and I'm going to be moving to vacate the restraining order because it's premised on the forfeiture amounts which are going to be vacated, your Honor.

THE COURT: I've now found liability. There's now a summary judgment that has found liability and is likely only going to get enhanced because of the circuit's ruling.

MS. SHEVITZ: I'm sorry, but that sounds like prejudging this based on not getting de novo sentencing, of not allowing us to show what was taken in and what the value of the securities there and the accounts that remain for these clients and yes, it is a hundred cents on a dollar.

THE COURT: First of all, the circuit's ruling with respect to Morrison was that Dr. Mayer or the Mayers were, in fact, defrauded in the United States. That's what they found. That's not what you argued in summary judgment here. And I

found that there disputed issues of fact on that, but the circuit has indicated in a footnote that they were not persuaded by that.

MS. SHEVITZ: It's hard to know why the circuit is ruling in a footnote, but the fact is, one of our petitions for rehearing is based on the fact that if we're going to find liability based on where Lisa Mayer was sitting at time she thought about committing to an investment, then we ought to be able to cross examine her. This is a ruling made on nothing except some deduction from a document and nobody has been able to cross examine Lisa Mayer.

THE COURT: Lisa Mayer was cross examined.

MS. SHEVITZ: Not on that issue. That wasn't an issue at the time, the issue of where she was sitting when she committed to the transaction was not an issue in any case.

THE COURT: But the circuit has already indicated their view on this, right?

MS. SHEVITZ: And one of the things that we raised is the right to cross examine before a finding of fact is made on that kind of analysis.

You may think it's not entitled to rehearing. I don't know. I think it's a fairly decent appellate issue that we ought to be able to cross examine someone before a finding is made on where they were at a specific time. That finding has never been made.

But I have more important things, too, and that is, they rely now, they meaning Mr. Jacobson and the SEC, on what Mr. Gazes is doing with his proofs of claim. Mr. Gazes and the SEC are taking the position that we, the defendants, are not entitled to see the proofs of claim or to take notes on them or to comment on them or to be heard on them at all.

Frankly, I don't understand how we can litigate a case as parties to a case and be deprived of notice and an opportunity to be heard and the right to receive documents on what our investors claim are their losses and the amounts that they're going to be charged with.

I will have to take that up to the circuit if this is what's going to happen. And this receiver, yes, he's not my receiver, you made that clear, but he was appointed to do certain tasks. And we agreed to $50,000 if he was going to see what was being held and how much the claims were and the value of the private equities. That hasn't happened.

Now, they want to say we're not even entitled to see the proofs of claim. And if I want to give Mr. Gazes three potential times that we can walk into his office and look at the proofs of claim but not take notes, then maybe he'll consider that.

They don't want to give us the proofs of claim because just as you were told at sentencing, they want to say that the presence of these funds, we still don't know how much, is not

relevant. I think that's very highly relevant. And this is the same thing that's going through the entire case; let's not tell the judge how much is really there.

THE COURT: That's exactly what Mr. Gazes has been charged with.

MS. SHEVITZ: He's not doing that because we asked where the money is. There was a Cayman account. I asked where the money is from the Cayman account and how much. I was told go ask the liquidator. Well, nobody talks to us, but these are our funds, these are the Amerindo funds.

Now, there is a reversal. There will be a reversal of a forfeiture order so the right, title, and interest to Amerindo and their entities returns to the defendants. They do have an interest in it. It is their companies. If they want to take it away and they want to take everything away, can't we do it with notice and an opportunity to be heard on all the relevant factors and the data? I don't know what the proofs of claim are.

All I know is that Mr. Gazes submitted some really incomprehensible claim registry which Mr. Jacobson told me I'm not entitled to get that either. They said Judge Sullivan didn't say you're entitled to get the claims register.

THE COURT: I'm not sure what Mr. Jacobson --

MS. SHEVITZ: With all due respect, there's no vehicle for just talking about what's going on here. Every time I try

and say something it goes beyond my three-page limit or my ten-page limit and I can't show you that there is enough money there. I can't show you the amounts. And another reason I can't show you the amounts is because they're not telling me. They're not telling me. They're saying that's all the SEC is going to tell you now.

Do you know that on the very first day of this case they brought a TRO while these two men were in jail awaiting their first detention hearing and they were not served. So, they didn't know that the SEC was installing a receiver or monitor.

THE COURT: That's what a TRO is. It's without notice. You're not familiar seriously? You just said there was a TRO and they weren't served.

MS. SHEVITZ: No. Then it became a preliminary injunction matter and Judge Swain talked about it, but these men and their views and their defenses were not before the Court and never were, never were.

I brought that up again with Mr. Jacobson. He said it's a little late to complain now, but I'm complaining now because nobody looked at the transcript before. Mr. Tanaka, yes --

THE COURT: Again, my focus here is simply on what we need to do --

MS. SHEVITZ: Yes, what we need to do --

THE COURT: -- to establish disgorgement.

MS. SHEVITZ: I don't know what the claims are because I'd like to see all the proofs of claim and the backup because I can't participate intelligently, or at all, without seeing that.

I find it really amazing that the SEC is taking the position that parties to the proceeding whose property they want to confiscate and already have in forfeitures and in restraints and in de facto restraints can't even see the basis for it.

THE COURT: You've made that point several times.

Mr. Gazes, your name has been taken in vain by the SEC and by -- maybe not you, but your name has been referenced by the SEC and by Ms. Shevitz.

Mr. Burger, actually, I jumped over you. Is there anything you want to add?

MR. BURGER: No, your Honor. Thank you.

THE COURT: Sorry about that.

MR. GAZES: I do want to address a few points that.

THE COURT: Keep your voice up. Move that mic a little closer. It's an acoustically challenging environment.

MR. GAZES: Certainly, I'm surprised by Ms. Shevitz' statements because at the beginning of my employment, I handed over to her every JPMorgan statement that was in my possession reflecting what was in the accounts before they were even

turned over to my office.

To suggest that something different happened to the amount of money that was in JPMorgan accounts to when they were transferred in my name, I don't understand. They are what they are. She has the statements and I give them to her.

I also invited the defendants to come to my office and review the claims. I think it's important that they review the claims. There may be information that they have that I'm not aware of. What I asked them to do is to not take the claims or otherwise copy them.

Ms. Shevitz wanted to take the claims. She actually asked me to email and send them to her. In light of the two letters that the defendants sent to investors, which appear to me to reflect that they were still in control or going to be in control of these funds, I felt that I didn't want to reveal who all the claimants were by giving them all the documentation.

But I gave them the invitation to come to my office and review those proofs of claim and that invitation is still open. There was no reason for me not to give them that invitation. So I don't understand that.

Furthermore, to continue to argue that they're not aware of what's out there is kind of ridiculous at this point. The cash is what is cash is. They have the bank statements. None of those statements have changed since the transfer into my name. What the Cayman Island money is going to be, we don't

know yet for a certainty because it hasn't been revealed to me yet. I'm still waiting for the receiver's report there. And the only other monies that may be out there may be some escheated funds or some miscellaneous accounts or some accounts that were held in other entities, which, by the way, would be in the defendant's knowledge which they are not revealing to us. So they're forcing me to go out and spend time --

MS. SHEVITZ: Excuse me. I didn't hear what we're not revealing to him. What is that?

MR. GAZES: All the money, all the accounts, where is it all? I've asked you to tell me that. I even asked you to give me the list of investors that your clients are sending letters to and you refuse to do that. You referred me to the government again.

I don't understand where you're coming from here. I tried to work out an agreement with them. They keep on saying they want all the investors to get their money, but they wouldn't enter into an agreement with me either.

I don't understand. What's revealed on the docket is all the claims that have been filed. Ms. Shevitz has all the statements. What she doesn't know is what we all don't know, what the value of the private securities will be.

They will be the value that we can get in the open market. Nobody really knows, but she talks about Mr. Ross' report as if it's a fait accompli that that's what the value is

and if that's what she believes, then she knows what the value of the private securities are, too. So, frankly, she has almost 90 percent of the picture of her own possession right now. I don't understand.

MR. JACOBSON: Just one more thing.

THE COURT: Quickly.

MR. JACOBSON: Going back to your initial question, which is whether we need additional discovery, I believe that in the context of the sentencing, at the very least, it will be a recalculation or a resubmission of evidence regarding forfeiture, which I think is directly related to our disgorgement claim.

THE COURT: You're asking the SEC case to follow the criminal case?

MR. JACOBSON: Just with respect to amount of money; however, we don't have to do that. We can go out ourselves -- I don't think we need discovery because I think most people would cooperate with us to just give us whatever we need.

However, we are willing to depose investors and go through our files again and we can submit an affidavit from our examiners who go through the files to see how much money was actually raised from the specific investors and we can present it to the Court that way. However, we think it might be coming up again anyway in criminal court.

THE COURT: I don't know when the mandate is going to

come down with the criminal case, and that's why I wanted to jump-start the SEC case.

MR. JACOBSON: Then we are willing to on our own try to come up with the exact numbers related to disgorgement with respect to the specific investors that were part of the criminal case and part of our summary judgment. In that context, though, I would expand that to include potential disgorgement sums from the entities from the context of a motion for default judgment as well with respect to the Amerindo entities themselves.

THE COURT: I'm not sure I understand what you're saying when you say you're going to, on your own, get information from various sources.

MR. JACOBSON: We have records of the same bank accounts that Mr. Gazes now has that shows money coming in from various investors into Amerindo accounts. That would be our calculation of disgorgement with respect to specific investors. That's to show how much, what money was received by the defendants.

THE COURT: It sounds to me you're just talking about making a supplemental submission that relates to disgorgement with affidavits or attachments from trial sources or --

MR. JACOBSON: Or from investors, specific investors, and from our own records that we have. And there are additional investors -- in our complaint, we mentioned several

investors who were not part of the criminal case they were ATGF II investors.

THE COURT: I get that Ms. Shevitz and Mr. Burger are going to say I'm not going to take that on faith. So, there may be a request then to depose or get other documents.

MR. JACOBSON: No, I understand that, but I don't believe the SEC needs to engage in discovery specifically in order to substantiate disgorgement; however, I understand if they would like to respond.

THE COURT: This is what I propose: It seems to me the SEC is indicating it has no desire for discovery and wants to move for summary judgment on disgorgement and damages, for lack of a better word, I would propose that we set a schedule for them to do that. And then the defendants get to respond to that and get to say, well, we think we need additional discovery before this is resolved and here's is the discovery we would need, at least. And then we would be addressing both the need for discovery and other substantive points as part of that briefing.

MS. SHEVITZ: I am the practitioner really who got into this case defending them on appeal.

THE COURT: Right.

MS. SHEVITZ: And I'm dragged into this case now because it deals with a quote "substitute assets" which are not substitute assets anymore. I'm not in a position to undergo a

lot of discovery, but I am in a position to ask for the proofs of claim and other backup that Mr. Gazes said.

Let me respond to what he said about he didn't say we couldn't have them. Email, October 4, and I would send it in, October 4, 2013: Ms. Shevitz, unless the Court orders otherwise and as stated in the report, the receiver has no intention of sharing the proofs of claim with your clients as demand. Should the defendants wish to examine the proofs of claim at my office and agree in writing prior thereto not to take notes and/or copy the papers, your clients are welcome to do so. Please forward three proposed dates and times and we will respond.

That's what I have to do to get the proofs of claim in a case that they're dealing with our assets? And there's a forfeiture order that's reversed. Really? Is that what I have to do to get them to not take notes and go take a look at them in his office and then go through discovery? I can't do that, Judge.

THE COURT: I'll let Mr. Gazes respond on his own, but my sense was this was after the defendants had basically made a mass mailing to investors in an effort that Mr. Gazes --

MS. SHEVITZ: Excuse me.

THE COURT: No, I'm not going to excuse you. You're going to sit down.

MS. SHEVITZ: I'm sorry.

THE COURT: I think Mr. Gazes was concerned that you were interfering with the task that he had been given by the Court.

Is that what was going on, Mr. Gazes?

MR. GAZES: Absolutely, that's exactly what was going on. And so I thought the best way to deal with that was to offer for them to come in, they can review the proofs of claim, they can provide me with what information they have by reviewing the claims, and I can deal with it at that point.

But I was very concerned, based on the two letters that had gone out and continue to hear in argument today before you, that for some reason, they think it's their money. And that's very disturbing when you have people sitting here, 34 claimants, who are out money for ten years, some destitute and in need of their money back.

So, I offered for them to come in and give me their thoughts with regard to the filed proofs of claim. I have not permitted anybody who is coming into my office to look at the proofs of claim to copy them. In some circumstances, I have sent them out.

But with regard to the defendants, since those two letters went out and it appeared to me that they seemed to be making the representation that they were going to be in control of these funds and otherwise the disbursements of them, I was worried that they were going to contact and find out more

people to, again, send out a third letter, and that was my premise for it.

THE COURT: But going forward now, with respect to the proofs of claims that have been submitted which you've tallied, the books are closed on that at this point; is that right?

MR. GAZES: That's correct.

THE COURT: What are you seeking now Ms. Shevitz?

MS. SHEVITZ: I'm seeking all the backup and all the proofs of claims and all the documents that were submit so I know what the claims are.

I'm seeking the information about where the assets are, what has been gathered. I'm seeking information about why nobody has told JPMorgan to credit interest. If there's a receiver of assets -- nobody's even asked JPMorgan which has been sitting on accounts without crediting interest for ten years now why is a receiver who is supposed to be maximizing the value not doing that? I'm also asking why, if when the receiver was first appointed to evaluate the private equities and all of the assets, why wasn't that done? We still don't know what they are.

I'm asking a lot of questions, but right now I would like to get copies of the documents and information about what assets are being held, where are they, under what circumstances because we do have an interest in the assets.

Now that the Court of Appeals has reversed or said it will reverse when the mandate issues the forfeiture and the restitution especially and we will ask for a jury trial on forfeiture on our resentencing under the rule, if there's going to be any forfeiture, we want to know what the evidence is.

Mr. Gazes refuses to give it to us. He says he invited us into the office; yes. He invited us in and then he wanted us to settle with a release, a general release of everybody or else you can forget it.

And I said forget it, we're not releasing anyone yet. We'd like to have the information. We'd like to have knowledge. We would like to have notice and an opportunity to be heard about what the facts are.

THE COURT: I understand, but what is the interest that you believe your clients have? Mr. Vilar and Mr. Tanaka have made a claim?

MS. SHEVITZ: Yes.

THE COURT: For how much?

MR. GAZES: There's been no claim filed by Mr. Tanaka or Mr. Vilar with me.

MS. SHEVITZ: We have explained to Mr. Gazes that the interest of the defendants is the remainder after the client claims of May 25, 2005, are paid in full on the accounts. That's our interest. It's the remainder. It's not a claim based on a certain amount now. We have said that. He refuses

to put it in because this is more prepunishment. I don't know why; I don't get it.

But also there are issues of Gabelli now. Are there going to be sanctions, financial sanctions, based on conduct five years earlier? We would like to be able to argue about that. I don't know when it was.

THE COURT: This is where we're going to go with this then. I'm going to allow the SEC to make their motion with respect to summary judgment on disgorgement and penalties.

I'll then give the defendants an opportunity to respond in which they can articulate the need for additional discovery, and they can also make the legal arguments, some of which have been referenced today.

MS. SHEVITZ: Thank you.

THE COURT: Then the SEC will get a chance to reply. In the meantime, the receiver will continue in compliance with the orders that I have issued because I do think it's important that we get these assets valued and that we start making distributions as quickly as we can because it seems to me that there is no dispute that there are investors who are out money who need to be repaid as quickly as possible.

MS. SHEVITZ: In the mandamus proceeding, the Court of Appeals said there was to be no distributions pending Court of Appeals decision.

THE COURT: In the criminal case.

MS. SHEVITZ: No, in the SEC case, in the SEC case. One of the mandamus actions was as to the SEC case. It was in that action, I don't know whether it's 1325 -- 27 or 132550, it's one of them, but it's the SEC case that the Court of Appeals said there is a stay of any distribution of the substitute assets or those assets pending the criminal case.

THE COURT: Right, I understand that.

MS. SHEVITZ: That stay is in effect.

THE COURT: I'm saying I want to get to the point where we can make distributions. Things have to happen before we do that, but I'm not waiting until the criminal case is resolved before we start valuing and preparing to make the distributions. We're not going to make them until we can.

MS. SHEVITZ: Okay.

THE COURT: But I'm not going to sit down and do nothing because years will go by potentially.

MS. SHEVITZ: We said we agreed to distributions but nobody wants to talk to us.

THE COURT: I think that's disingenuous.

MS. SHEVITZ: It's not disingenuous. We can't do it. We can't do it.

THE COURT: You can't do what?

MS. SHEVITZ: We can't make a distribution because their thumbs are on the scales here. How can we make a distribution?

THE COURT: If the parties came to an agreement about distributions, we can easily make those distributions. We've had conversations on this subject. And you and your clients declined to do this. Sharon Levin was in the room. I recall this distinctly Judge Swain and I were there together.

MS. SHEVITZ: Yes, because we don't have a full value of all the assets, Judge. We asked for valuation of these private equities. It hasn't been done. That was in your Honor's first order.

THE COURT: These private equities are hard to value.

MS. SHEVITZ: I understand that. In fact, our first hearing --

THE COURT: Mr. Gazes, that's in the cards? That's what you plan to do.

MR. GAZES: Yes, it is, but once again, let's discuss the disingenuousness of the argument.

My settlement discussions with Ms. Shevitz and the defendants was part and parcel of setting aside the valuation of the private equities and not pursue them at this point, including the dissolution of the pension plan, pending a 50 percent distribution on initial claims only because Mr. Tanaka and Mr. Vilar assert a claim to all money that was earned post-2005. That was part of the agreement. I have nine drafts of it to show you if I had to. So, I don't understand how that argument is being made now. But we will and we are and I have

contacted a company to undertake the review of the private securities and make a determination as to what value they can fetch for us.

But all other assets have been fully disclosed. There is nothing of mystery here.

THE COURT: Why are we not making a distribution on the cash? I don't understand. What is the reason for not doing that?

MS. SHEVITZ: I don't know all the claims, Judge. He won't give me the claims that he has. He won't let me dispute them or say, hey, this guy who they're relying on, Burke, he doesn't have a claim. Who else is there? I don't know.

There's a list of claims now that have people that are not claimants. Mr. Gaze's, as recently as October something, asked me for our list because he doesn't know who the claimants are.

THE COURT: He's interested in getting information from all sources. There may be disputes. That's the process that has to be gone through.

MS. SHEVITZ: I heard you, but it's not happening. Sharon Levin, in the beginning of the case, from something I quoted said, she just realized, gee, there's long-term family investors in this business, a lot of them don't have backup. We know that. The real repository for who has claims is these men's account, these men's minds, and nobody wants to talk to

them. They just want to demand things from us.

THE COURT: Mr. Gazes, do you not want to talk to the defendants?

MR. GAZES: I absolutely do. And I have been, I met them in my office when I was first appointed. I invited them to come back to my office and sit with me to go through their claims and give me their thoughts. I don't understand why this argument is being made before you.

THE COURT: I'm not sure either.

MS. SHEVITZ: Because I haven't been able to explain it well, I guess.

THE COURT: Not from lack of having time, so we're going to cut this short.

MS. SHEVITZ: Can I get the backup to be able to respond to whatever the SEC says? I can't do it without knowing what the facts are now.

THE COURT: I don't know what the SEC is relying on in their papers. When you see the SEC's papers and you believe you need additional discovery to respond to the summary judgment motion, then you get to make that argument. That's not unusual.

MS. SHEVITZ: I want to say something about these client letters that were written.

Yes, Mr. Tanaka and Mr. Vilar, who have been out of communication with their clients and it's a family group for

all these years, wrote a nice letter to their clients.

THE COURT: A nice letter.

MS. SHEVITZ: Have you seen it?

THE COURT: I have seen it.

MS. SHEVITZ: You have seen it?

THE COURT: I have.

MS. SHEVITZ: Is there something wrong with it?

THE COURT: I think it's inappropriate at this stage of the game.

MS. SHEVITZ: For them to communicate with their clients?

THE COURT: Yes, when I appointed a receiver whose job is tasked to do this.

I didn't issue a gag order or an order preventing it. So, I haven't held anybody in contempt. I'm not going to do that, but I do think it was a little cute, and it did suggest to me that there's a real intention here to mess with the receiver in the tasks he's been given.

MS. SHEVITZ: We're not messing with the receiver.

THE COURT: I hope not, because that would be a 3553(a) factor, too.

MS. SHEVITZ: I hear you. In fact, the letter told the clients to cooperate with the receiver. I don't know if that's before the Court. But instead of maligning the defendants without a chance to respond, can we put the letters

in evidence and look at those?

THE COURT: In evidence for what?

MS. SHEVITZ: On, this record, when they're talking about --

THE COURT: All I'm trying to do now is set a schedule and you keep injecting new issues.

MS. SHEVITZ: I'm talking about an appeal record, as well. And before people are talking about letters, innocuous letters, saying, hello, we're still here, if this is overturned, we intend to pay you, there's something wrong with that, to write to their own investors in Panama?

I'd like to put this letter before the Court of Appeals.

THE COURT: You can do what you want. I have to establish this usually for most lawyers, but I have to convey that you don't have unfettered discretion to my time. You don't. You're not entitled to it. You don't get to just say whatever pops into your head in whatever order it comes in, the same with your letters and your submissions, okay?

You have to get to point. You have to cite authority. And you have to start recognizing that you are not the only lawyer in the courtroom, and you're not the only case on the docket.

When does the SEC want to make its motion for summary judgment motion with respect to disgorgement and penalties?

MR. JACOBSON: If we could have six weeks to file.

THE COURT: Six weeks.

THE DEPUTY CLERK: December 6.

THE COURT: I'll give the defendant six weeks to respond. That's right by the holidays. I'll give you seven weeks.

MS. SHEVITZ: We would also like to see the JPMorgan statements going forward, too. We have not gotten them except once or twice. They're being withheld from us. We'd like to be able to see these things to participate knowingly in this and intelligently.

Also, since your Honor directed a response in the motion for reconsideration of summary judgment that's pending, can we just put this all together, so I can respond to that, as well as this disgorgement?

THE COURT: The motion for reconsideration has been pending for how long? When did you make it?

MR. JACOBSON: I believe within ten days or so after the Second Circuit.

THE COURT: You were supposed to respond it to and just didn't do it. I have given you two weeks to just rule without anything from you, but you have two weeks to respond to that. I gave you until November 4. So whatever that is, ten days, but you've had months to do that. They responded to yours.

MS. SHEVITZ: Yes. I asked them for an agreement to put it off because I was moving. I know you didn't think it was that much of a deal but it was deal.

THE COURT: I accommodated every request you made during that time.

MS. SHEVITZ: I'm saying if we're having summary judgment submissions, can't we put it all together with their next summary judgment submission?

THE COURT: No. One is a motion for reconsideration on a summary judgment ruling I have already issued on liability and that relates only to a discrete issue that's in the Second Circuit's decision in the criminal case. That's very discrete. That's that motion.

The motion now we're talking about is with respect to disgorgement, and that I'm giving you more time for, the SEC is going to file by December 6. And then I will give you until January 24. I'll give you to the 24th. And if there's going to be a reply at that point, February 3.

In the meantime, the receiver will continue complying with my prior orders. The receiver has requested that I extend the claims objection date to February 8. I will grant that request with the understanding that that time will be used to try to resolve disputed claims and try to reach a consensus with respect to most of the claims.

This is not going to be an easy process, but it seems

to me that most people should all be on the same page as trying to nail this down with the most accurate information possible. So I'm going to grant that request, as well. In the meantime, I don't know when the criminal case will come down, when the mandate will come down, but if and when it does, then that might alter some of this schedule, but I'm not waiting for that. I want the SEC case moving forward.

MR. GAZES: Yes.

THE COURT: Is there anything else we need to cover from your perspective?

MR. GAZES: No.

THE COURT: Mr. Jacobson?

MR. JACOBSON: No. Thank you, your Honor.

THE COURT: Mr. Burger?

MR. BURGER: No.

THE COURT: Ms. Shevitz?

MS. SHEVITZ: No.

THE COURT: Thank you all. We thank the court reporter for her time. She has been working the entire time. Thank you.

If anyone needs a copy of the transcript you can take that up with her now or through the website.

MS. FISHER-BYRIALSEN: We don't have a date in other case in the criminal case to come back for a decision on the bail.

THE COURT: No, because I don't have a mandate.

MS. FISHER-BYRIALSEN: But you're not going to make a decision on whether or not you're going to set bail.

THE COURT: I'm going to decide that shortly.

MS. FISHER-BYRIALSEN: We're not coming back to court for that.

THE COURT: No. If you want to make an additional submission on which standard I'm applying, you can do that by Monday. You don't have to, you're welcome to, but then I will rule after Monday.

(Adjourned)